

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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FREDERICK MARC COOLEY,) Case No.: 2:10-cv-1138-RLH-RJJ
Plaintiff,)
vs.)
R. LEUNG, P#8556 and E. LUDTKE, P# 9044)
Defendants.)

O R D E R

(Motion for Involuntary Dismissal or
alternatively Discovery Sanctions - #41)

Before the Court is Defendants Officers Leung and Ludtke's **Motion for Involuntary Dismissal; in the alternative Motion for Sanctions for Failure to Participate in Discovery** (#41, filed December 26, 2012). Plaintiff has failed to file an opposition. For the reasons discussed below, the Court grants Defendants' Motion.

BACKGROUND

This is a § 1983 case arising out of the impoundment of Plaintiff Frederick Marc Cooley’s (“Cooley”) vehicle by Defendants Leung and Lutke, officers with the Las Vegas Metropolitan Police Department. The Court directs the reader to its previous order (#40, Nov. 26, 2012) for a more detailed recitation of the facts of this case. The facts relevant to the instant motion are:

1 On September 14, 2012, the Court entered a Proposed Discovery Plan and
 2 Scheduling Order with a discovery deadline of December 3, 2012. (#36). Defendants served
 3 written discovery, interrogatories and requests for production, on Plaintiff on June 18, 2012. As of
 4 November 14, 2012, Plaintiff had not responded and out of concern for the discovery deadline,
 5 Defendants scheduled Plaintiff's deposition despite not having those answers. Plaintiff failed to
 6 appear at the November 30, 2012 deposition. Plaintiff called to inform defense counsel of his
 7 inability to appear due to financial issues three minutes before the deposition was scheduled to
 8 begin. Defendants incurred \$862.60 in fees and costs due to Plaintiff's failure to appear.
 9 Defendants now seek involuntary dismissal of Plaintiff's Complaint for failure to participate in
 10 discovery in good faith, or alternatively, discovery sanctions.

11 DISCUSSION

12 A. Legal Standard

13 The Ninth Circuit has strictly construed the language of Rule 37(d). *See Estrada v.*
 14 *Rowland*, 69 F.3d 405, 406 (9th Cir. 1995) (holding that the rule applies only when a deponent
 15 literally fails to show up for a deposition session). Rule 37 authorizes a wide range of sanctions for
 16 a party's failure to engage in discovery. The court has the authority under Rule 37(b) to impose
 17 litigation-ending sanctions. *See Shepherd v. Am. Broad. Co., Inc.*, 62 F.3d 1469 (D.C. Cir. 1995)
 18 (holding court may impose litigation-ending sanctions where it finds by clear and convincing
 19 evidence that abusive litigation behavior occurred and lesser sanction would not sufficiently
 20 punish and deter the misconduct). When dismissal is the sanction, however, "the range of
 21 discretion is narrowed and the losing party's noncompliance must be due to willfulness, fault, or
 22 bad faith." *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997) (*quoting Henry v. Gill*
 23 *Indust.*, 983 F.2d 943, 946 (9th Cir. 1993)).

24 Before dismissing a case for noncompliance with court-ordered discovery under
 25 Rule 37, the district court must weigh the following five factors: "(1) the public's interest in
 26 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of

1 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and
 2 (5) the availability of less drastic sanctions.” *Malone v. United States Postal Service*, 833 F.2d
 3 128, 130 (9th Cir. 1987). “The first two factors support sanctions and the fourth factor cuts against
 4 a default. Therefore, it is the third and fifth factors that are decisive.” *Adriana Int’l Corp. v.*
 5 *Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990).

6 The Ninth Circuit evaluates whether a district court properly considered the
 7 availability of lesser sanctions by examining whether the court: (1) explicitly discussed the
 8 possibility of less drastic sanctions and explained why alternative sanctions would be
 9 inappropriate; (2) implemented alternative sanctions before ordering default; and (3) warned the
 10 party of the possibility of default before actually ordering it. *Stars’ Desert Inn Hotel & Country*
 11 *Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997) (*citing Hyde & Drath v. Baker*, 24 F.3d
 12 1162, 1166 (9th Cir. 1994)). *See also Valley Eng’rs v. Electric Eng’rs Co.*, 158 F.3d 1051, 1057
 13 (9th Cir. 1998). Ninth Circuit decisions “suggest that a district court’s warning to a party that his
 14 failure to obey the court’s order will result in dismissal can satisfy the ‘consideration of
 15 alternatives’ requirement.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1991).

16 B. Analysis

17 As a preliminary matter, Plaintiff has failed to respond to Defendants’ Motion.
 18 Failure to file points and authorities in opposition to a motion constitutes consent that the motion
 19 be granted. L.R. 7-2(d); *see Abbott v. United Venture Capital, Inc.*, 718 F. Supp. 828, 831 (D.
 20 Nev. 1989). Thus, Plaintiff is deemed to have consented to the granting of Defendants’ Motion.

21 Moreover, under Rule 37(d), sanctions are appropriate because Cooley failed to
 22 appear at his deposition. Defendants’ urge the Court to involuntarily dismiss Cooley’s complaint.
 23 Under the third *Malone* factor, there is some prejudice to Defendants because they are unable to
 24 obtain necessary information for the defenses to Plaintiff’s claims. However, on balance with the
 25 fifth *Malone* factor, the Court finds that alternative less drastic sanctions, specifically monetary
 26 sanctions, are appropriate at this stage in the proceedings. Therefore, the Court orders Cooley to

1 pay the reasonable expenses of \$862.60 incurred by Defendants in attempting to obtain Cooley's
2 deposition within 60 days of this Court's order. This amount includes attorney's fees at \$190/hr for
3 four (4) hours for Attorney Thomas D. Dillard Jr.'s time in preparing for the unattended deposition
4 and preparing the instant motion, and \$105.60 in court reporter costs.

5 However, the Court strongly warns Cooley that if he fails to obey this Court's
6 order, he will be considered to be in contempt and further, failure to abide by this Court's order
7 may result in dismissal of his Complaint. Last, once Cooley has remitted payment in full,
8 discovery will be reopened for 45 days to allow defense counsel to obtain Cooley's deposition.
9 Cooley is ordered to appear for his deposition. Failure to cooperate in the setting and taking of his
10 deposition will result in an Order precluding Plaintiff Cooley from testifying at trial or in
11 opposition to a motion for summary judgment.

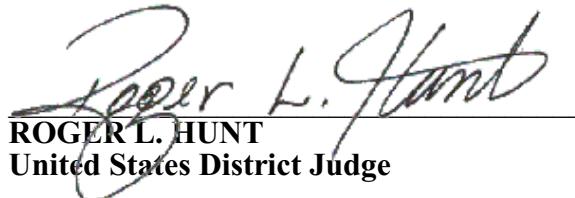
12 **CONCLUSION**

13 Accordingly, and for good cause appearing,

14 **IT IS HEREBY ORDERED** that Defendants' Motion for Involuntary Dismissal; in
15 the alternative Motion for Sanctions for Failure to Participate in Discovery (#41) is GRANTED.

16 **IT IS FURTHER ORDERED** that Plaintiff Cooley to pay Defendants the total sum
17 of \$862.60. Plaintiff Cooley is further ordered to make full payment to Defendants within 60 days
18 of this Order.

19 Dated: January 16, 2013.

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21 **ROGER L. HUNT**
22 **United States District Judge**
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